SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-301

PAUL C. WASHBURN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR REHEARING ON DENIAL OF PETITION FOR WRIT OF CERTIORARI

William J. Beiswanger
Attorney for Petitioner
104 North County Road
P. O. Box 748
Palm Beach, Florida 33480
(305) 832-6357

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Petitioner's petition for rehearing is based on certain factors this Court may have overlooked in review of his case.

Petitioner filed a motion for new trial to his conviction of tax fraud on the grounds that his conviction was predicated upon false testimony given at trial by two witnesses, Edward B. and Manuela H. McLean (taxpayers). The issue at trial was whether or not Mrs.

McLean consented to file an amended joint return for 1968. Although Mrs. McLean did not sign the alleged fraudulent return nor the power of attorney authorizing Petitioner to file the joint return on her behalf, if she otherwise had consented to the return, Petitioner has committed no crime. (Transcript 393, 394).

The district court's Order, denying Petitioner's motion for new trial, stated that the new evidence was immaterial to the conviction as the agreement to file jointly was entered into more than two years after the preparation of the alleged fraudulent return. (Appendix IV-1). The Solicitor General's memorandum in opposition to Petitioner's petition for writ of certiorari stated that the district court concluded that Mrs. McLean's trial testimony was truthful. The Solicitor General admitted that if the McLeans were lying at trial, Petitioner would be entitled to a new trial. (Resp. 5). However, the Solicitor General's statement that the district court correctly concluded that Mrs. McLean's trial testimony was not false is in itself incorrect. The district court does not conclude that Mrs. McLean was telling the truth at trial but merely that the new evidence is immaterial! Thus, the premise upon which the Solicitor General promulgated his opposition is contrary to fact.

The lies upon which Petitioner was convicted were patent. Mrs. McLean refers to the property settlement agreement (newly discovered evidence to file jointly) when she stated that she bought her house from her husband. (Transcript 73, 74). The newly discovered evidence included the provision whereby Mrs. McLean agreed to pay Mr. McLean $206,000 for the

home formerly owned by both. (Appendix III-29). Petitioner's trial attorney then asked Mrs. McLean if she had ever received a letter from her husband outlining the conditions whereby they would file jointly and she answered, "No". (Transcript 74). He then asked her if it wasn't true that she and her husband were entitled to file jointly for 1968, and she replied: "No, we never came to that agreement." (Transcript 75). Petitioner's trial attorney asked her if she had ". . . ever talked to *anyone* concerning filing *at this time* for 1968 with her former husband . . .". (Transcript 77). Mrs. McLean replied: "I don't think there would be any reason to discuss it." (Transcript, 77). The district court then instructed Petitioner's attorney to go on to a new subject. (Transcript, 78)

Paragraph (f) of the newly discovered evidence contains the agreement whereby Mr. and Mrs. McLean would file joint returns for years 1968 through 1971. (Appendix III-29). Did Mrs. McLean make a distinction between receiving a letter from her husband to file jointly from receiving an agreement from her husband to file jointly? Did Mrs. McLean testify that she knew of that part of the agreement which provided that she was to buy the house from her husband for $206,000 but she knew nothing of that part of the agreement providing for filing joint returns? (Her signature is affixed to the entire agreement). Did Mrs. McLean not talk to anyone, even her own attorneys, about that part of the agreement to file joint returns? Did Mrs. McLean interpret the words "at this time" to mean some other time then the execution of the agreement even though the execution was but three days before trial? Was the trial court correct in instructing

Petitioner's attorney to go to another subject when he asked Mrs. McLean if she had ever received any correspondence on the matter of agreeing to file jointly? These untruthful utterances and deceptions on part of Mrs. McLean directly resulted in Petitioner's conviction of the crime of filing a false and fraudulent 1968 joint return in that the jury found that Mrs. McLean had not given her consent thereto. The jury is entitled to this additional evidence of consent showing Mrs. McLean's testimony was false.

The overwhelming evidence is that Mrs. McLean was not truthful when she testified she did not consent to file jointly. Is the district court correct in finding the agreement to file jointly immaterial when such evidence goes directly to the issue in question and established that testimony at trial on the issue is false? Has Petitioner received a fair trial and been accorded due process when his conviction has been based on false utterances? Has the Solicitor General acted responsibly by representing to this Court that the district court found that testimony given was true notwithstanding the district court made no such finding? Has this Court reversed its position that it is the function of the jury, not the trial court, to determine if there was sufficient evidence, other than that given by a false witness to sustain a conviction? Has this Court reversed its position that a lie, if anyway relevant to the case, must be corrected by the appellate courts?

WHEREFORE, in consideration of the premises, Petitioner prays that this Court will reconsider its

denial of Petitioner's petition for a writ of certiorari and grant Petitioner a new trial.

Respectfully submitted,

/s/ W. J. BEISWANGER
WILLIAM J. BEISWANGER
Attorney for Petitioner
104 North County Road
P.O. Box 746
Palm Beach, Florida 33480
(305-832-6357)

PROOF OF SERVICE — AFFIDAVIT

I, WILLIAM J. BEISWANGER, attorney of record for Paul C. Washburn, Petitioner, herein deposes and say that I served by mail three copies of Petition for Rehearing to the Supreme Court of the United States upon the Solicitor General, Department of Justice, Washington, D.C. 20530. Respondent herein.

/s/ W. J. BEISWANGER
William J. Beiswanger
Attorney for Petitioner
104 North County Road
P.O. Box 746
Palm Beach, Florida 33480
(305-832-6357)

SWORN to and subscribed before
me this 17th day of January, 1975.
/s/ CARL M. COLLIER
Notary Public, State of Florida at Large
My Commission Expires:
May 5, 1978